

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies	)	
For Forbearance under 47 U.S.C. 160(c) from	)	CC Docket No. 04-440
Title II and <i>Computer Inquiry</i> Rules with Respect	)	
To Their Broadband Services	)	

**COMMENTS OF COVAD COMMUNICATIONS  
OPPOSING VERIZON TELEPHONE COMPANIES'  
PETITION FOR FORBEARANCE**

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Covad herewith submits its comments opposing the petition for forbearance filed by the Verizon Telephone Companies (“Verizon”), for forbearance from applying to Verizon’s broadband services Title II requirements and *Computer Inquiry* rules.<sup>1</sup>

As an initial matter, the Commission should take note of Verizon’s statement that it seeks the “same relief” as that sought in a previous petition filed by BellSouth.<sup>2</sup> In that petition, BellSouth acknowledges that forbearance from the unbundling and collocation provisions of sections 271 and 251 of the Act is not part of its forbearance request.<sup>3</sup> Accordingly, the Commission should take Verizon at its word, and narrowly construe its forbearance request as seeking the “same relief” as BellSouth’s forbearance request. Consequently, Verizon cannot be awarded forbearance from the unbundling and collocation provisions of sections 271 and 251 of the Act as part of its forbearance request here, since such forbearance is simply not part of Verizon’s request.

Notwithstanding the omission of forbearance from any part of sections 251 and 271 of the Act from its request here, Verizon’s petition here proceeds from the same ill-founded assumptions underlying its previous requests for forbearance from those sections of the Act. Notwithstanding Verizon’s claims of significant intermodal competition,<sup>4</sup> the fact remains that in most areas of the country, Covad is now the only provider of broadband access services left to compete with cable and ILEC broadband. According to the Commission’s latest data, the incumbent telephone companies and cable providers

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<sup>1</sup> Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services; WC Docket No. 04-440 (filed December 20, 2004) (“Verizon Petition”).

<sup>2</sup> See Verizon Petition at 2.

<sup>3</sup> See Petition of the BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements; WC Docket No. 04-405 (filed October 27, 2004) (“BellSouth Petition”) at 29, n. 103.

<sup>4</sup> See Verizon Petition at 3-8.

control more than 93% of the nation's broadband access lines.<sup>5</sup> Moreover, many end users lack a choice even amongst this limited set of two providers. Cable providers have historically focused their network deployment in residential areas, leaving most businesses with the incumbent telephone company as their only broadband option. Business customers have far less access to cable modem service. That is because cable companies did not generally build their plant to provide access to businesses in commercial centers, since cable traditionally sold programming that was not targeted at business users. Moreover, cable modem services are technically less suitable for business use.<sup>6</sup> As the businesses actually deciding between these competing broadband platforms themselves say:

Cable modem service presents serious security and reliability issues that, while present for residential users, are of far greater concern when used to support business applications... In addition, service quality for cable modem service not equivalent to ILEC standards... Additionally cable modem transmission speeds are not consistent, due to the "shared platform" architecture... Finally, cable modem platforms do not offer business customers a sufficient level of security.<sup>7</sup>

In fact, recent figures show that cable penetration in the small business segment is miniscule and has actually dropped:

[The Yankee Group] projected cable modem would surpass DSL in this [the small business] segment by year-end 2003. However, cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited success in the remote office market, reaching only 4.2 percent of the market in 2003 . . . *DSL operators*

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<sup>5</sup> See *High-Speed Services for Internet Access: Status as of June 30, 2004*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Tables 1, 5 (December 2004). Specifically, out of a total of 32,458,458 high-speed lines (over 200kbps in at least one direction), RBOCs served 10,292,448 lines, other ILECs served 1,566,414 lines, and cable providers served 18,592,636 lines.

<sup>6</sup> See Initial Comments of Covad Communications in WC Docket Nos. 04-313, 01-338, *DeRodeff Decl.* at 8; *UNE Remand Order* ¶ 189.

<sup>7</sup> Comments of Ad Hoc Telecommunications Users Committee, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, March 1, 2002, pp. 18-19.

*dominate* the U.S. [small business] broadband and enterprise remote-office broadband market.<sup>8</sup>

The fact of the matter is that in office parks and business developments, ILEC offerings, be they expensive T-1s or DSL, are the only game in town, and the only competitive threat is CLECs utilizing loop based UNEs. Nor can the Commission rely on other broadband modalities to compete against the cable and wireline duopolists. Fixed wireless and satellite are not yet real alternatives. Fixed wireless reaches only 3% of residential customers, with actual consumer uptake at a much lower level.<sup>9</sup> Fixed wireless also generally costs more and provides less bandwidth than DSL.<sup>10</sup> And while satellite reaches more customers than fixed wireless, it suffers quality problems in comparison to DSL that render it a different service altogether.<sup>11</sup>

Not surprisingly, according to the FCC's latest data, satellite and fixed wireless broadband together account for less than 2% of total high-speed lines in service.<sup>12</sup> Other broadband modalities – Wi-Max and powerline, may be promising, but are almost exclusively future sources of possible competition, and are meaningless for virtually all homes and businesses in the U.S. The Commission well knows that it took the last major new technology – cellular and PCS – many years to achieve anything approaching ubiquity, and even more to achieve competition from multiple independent providers.

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<sup>8</sup> Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added).

<sup>9</sup> ILEC UNE Fact Report, submitted with ILEC Comments in CC Docket No. 01-338, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, April 5, 2002, at IV-19; Siwek Decl. submitted in CC Docket No. 01-338, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Nov. 19, 2002 ( "Siwek Decl."), ¶¶ 48-57.

<sup>10</sup> Joshi, Moyer, Richman, Zulevic Joint Decl. submitted with Covad's Comments in CC Docket No. 01-338, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, April 5, 2002, at ¶¶ 22-23 ("Joshi Decl."); Siwek Decl. ¶¶ 48-57.

<sup>11</sup> Joshi Decl.. ¶¶ 24-26; Siwek Decl. ¶¶ 48-57.

<sup>12</sup> See *High-Speed Services for Internet Access: Status as of June 30, 2004*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 1 (December 2004).

The Commission cannot rationally base competition policy on press releases and futuristic predictions that may or may not ever translate into competitive reality. Broadband over powerline in particular remains in its commercial infancy, with hardly any commercial deployment and an uncertain future.<sup>13</sup>

Simply put, there is, at best, a duopoly market for broadband, and even that small measure of choice is denied to the vast majority of business end users. As both the Department of Justice and the FCC have long recognized, duopoly conditions are insufficient to produce competitive outcomes. Duopoly competition is problematic not only because the firm with the larger market share may exercise market power, but also because *both* participants are likely to have the incentive and ability to maintain prices above competitive levels rather than attempting to ruthlessly compete with each other, as they would need to do in a market with multiple firms.<sup>14</sup> Accordingly, as the FCC has concluded, “both economic theory and empirical studies” indicate that “five or more relatively equally sized firms” are necessary to achieve a “level of market performance comparable to a fragmented, structurally competitive market.”<sup>15</sup>

There are also serious grounds for concern whether vigorous competition will result from a duopoly composed of two historically monopoly industries with established patterns of anticompetitive behavior. As one commentator has noted, the cable industry shares:

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<sup>13</sup> Indeed, even Verizon has conceded that broadband over powerline is available commercially only on a limited trial basis in two discrete locations, and it is not clear whether these trials have actually attracted any customers. *See* Ex Parte Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at n. 41 (filed in WC Docket No. 01-338, April 15, 2004).

<sup>14</sup> *See* United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

<sup>15</sup> Report and Order, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, ¶ 289 (2003).

...some of the ILECs' most disturbing structural characteristics and incentives to suppress technological progress and the emergence of a competitive, open-architecture industry. For the last decade the CATV sector has been consolidating into a small group of regional cable television monopolies, all of which operate closed, vertically integrated systems, and which in turn are owned by an oligopoly of national media conglomerates (including broadcast and cable television content and distribution, newspaper chains, music and film studios, and Internet access service). For several reasons a competitive, technologically dynamic, open-architecture broadband industry represents just as deep a threat to these companies as it does to the ILECs. Their services, strategies, and policy positions already reflect this fact, and the prospect of a broadband industry dominated by an ILEC-CATV duopoly therefore raises major concerns.<sup>16</sup>

The Commission has repeatedly recognized the patterns of strategic and anticompetitive behavior by cable and local telephone companies. It was these long established patterns of behavior that prompted Congress to pass two pieces of comprehensive legislation to attempt to ameliorate them, one for each industry.

An independent report of the Congressional Budget Office succinctly summarized the problem:

Among markets nationwide, the combined share of broadband service provided by local telephone and cable companies averages more than 90 percent. That feature of the supply side of the residential market for high-speed Internet access raises the possibility that the two dominant firms in each individual market might be able to keep prices above the cost of providing service. If that occurred, too few people might subscribe to a broadband service at too high a price relative to the prices that would prevail in a more competitive market – a situation known as market failure.<sup>17</sup>

As the regulation of ILEC broadband services is slowly whittled down, the results of that market failure are becoming evident. Thus stock market analysts point to recent increase in SBC's DSL pricing as a reason to purchase the duopolists' stock.

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<sup>16</sup> Ferguson, Charles H., *The Broadband Problem*, Brookings Institution Press, p. 139 (2004).

<sup>17</sup> Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?*, CBO Paper, December 2003, at 1. See also *Siwek Decl.* ¶ 86 ("by any definition, the ILECs continue to possess market power" in broadband markets).

After all, the market for bundled telecom services is essentially a duopoly (particularly long term, as UNE-P cease to be a viable alternative). And . . . duopoly economics suggest that there is a strong likelihood that prices will not only stabilize as the market matures, but eventually even move higher.<sup>18</sup>

Further, actual marketplace evidence confirms that, rather than competing head on with each other, the cable companies and incumbent LECs are carving up the broadband marketplace into separate market niches – exactly the sort of exercise of market power one would expect from rational duopolists. For example, according to one analyst, cable companies and incumbent LECs are likely to divide up broadband consumers into higher-priced higher-speed services and lower-priced, lower-speed services, respectively, rather than competing with each other head on:

‘I think the cable companies would much rather play a speed game,’ said Jonathan Hurd, an analyst at Adventis, a Boston-based research and consulting firm. . . ‘Cable companies don't have as much pricing flexibility as the phone companies on average right now . . . From a cash flow perspective, they are more sensitive to changes in average revenue per user. So they would rather tout speed than price in terms of their marketing.’<sup>19</sup>

The solution to these stagnant duopoly market conditions is not further deregulation. Deregulation quite simply does not influence duopoly market dynamics, and is far more likely to aggravate them, nor does deregulation create competition where none exists. Vigorous facilities based competition from a multiplicity of market insurgents like Covad, unencumbered by incumbent agendas and strategic tradeoffs, is the answer.

Furthermore, Verizon’s petition here cannot be supported by the same unfounded claims of any need for deregulation of legacy facilities containing some portion of fiber

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<sup>18</sup> Banc of America Securities, Equity Research, Multichannel TV Comment, Feb. 2, 2004, at 1-2.

<sup>19</sup> See “BellSouth cuts price for high-speed Net service,” Atlanta-Journal Constitution, Sept. 28, 2004.

loop plant. Here, Verizon does not limit its forbearance request to such fiber-containing facilities. Rather, Verizon's petition sweeps broadly to include any ILEC broadband service, whether offered over legacy copper loop plant, legacy hybrid loop plant, or full fiber loop facilities. In fact, Verizon's petition gives the lie to previous Bell company claims of any need for the Commission to incent fiber deployment. Having gotten all the fiber deregulation they supposedly once needed to incent further fiber deployment, the Bells arrive yet again at the Commission seeking even more deregulation.

Indeed, the Bell companies' own inconsistent statements raise fundamental questions about the Bells' many statements to the Commission that deregulation of fiber deployment is necessary to spur investment. When the Commission this year deregulated fiber-to-the-curb facilities and exempted fiber loop facilities from the requirements of section 271, the Bell companies trumpeted the Commission's decision, claiming that it would lead to dramatic increases in their fiber deployment.<sup>20</sup> Yet when subsequently addressing investors, the Bell companies made clear that the Commission's decisions to deregulate fiber had little effect whatsoever on their plans to invest in fiber network plant:

SBC Communications Inc., the nation's second largest local telephone provider, expects the first half of its program to bring fiber-optic cables to the edge of most neighborhoods will cost \$4 billion through 2007, down from an earlier projection of up to \$6 billion...

The officials also asserted that SBC will capture about 70 percent of the operating savings made possible by replacing copper with fiber-optic technology...

SBC executives also said the company's approach would not be swayed by a recent federal decision which frees BellSouth Corp. from any obligation to lease to rivals any fiber lines which extends further into the neighborhood, or within 500 feet of most homes.<sup>21</sup>

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<sup>20</sup> See, e.g., "SBC Communications To Rapidly Accelerate Fiber Network Deployment In Wake Of Positive FCC Broadband Rulings," News Release, Oct. 14, 2004 (available at <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21427>).

<sup>21</sup> See "SBC Cuts Projected Cost of Fiber Program," Associated Press, Nov. 11, 2004.



Shortly after convincing the Commission to exempt its planned fiber facilities from unbundling requirements, BellSouth was surprisingly cavalier in its dismissal of any actual benefit of the Commission's decisions to fiber deployment:

A BellSouth spokesman said expansion of the company's fiber deployment project didn't mean more hires. "We've been deploying fiber for 20 years," he said: "There is no need to hire more people because we've been doing it for so long." BellSouth has passed 1.1 million homes with fiber and plans to bring it to an additional 180,000 homes in 2005, mostly in the green field areas. "We have more fiber than anybody else," the spokesman said...

The BellSouth spokesman said: "Whatever Verizon does, doesn't affect us at all... BellSouth already made a decision that we won't do [FTTP] or [FTTH]. We've been doing [FTTC] for years and will continue [to move in] that direction."<sup>22</sup>

These statements suggest that even with respect to truly new forms of fiber facilities, deregulatory action does not produce the Commission's hoped for benefit, ie. increased investment, while it unquestionably limits the ability of competitors like Covad to offer competing broadband services pursuant to the unbundling requirements of the 1996 Act. Whatever view the Commission takes of this issue, however, deregulation of existing legacy loop facilities cannot possibly create incentives for new investment. Indeed, as the statements above reflect, deregulation of existing legacy loop facilities has simply resulted in the Bells continuing to deploy the same legacy network architectures that they admittedly have been deploying for decades. In other words, deregulation of legacy loop facilities has not resulted in any increased or innovative investments by the incumbents – rather, it has simply set the stage for their remonopolization of the services offered over their existing legacy loop plant.

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<sup>22</sup> See Communications Daily, "Bells Expected to Hire Thousands to Build Fiber Networks," Nov. 29, 2004.

For the forgoing reasons, Covad respectfully submits its comments opposing Verizon's request for forbearance.

Respectfully submitted,

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